**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| STATE OF WASHINGTON, | ) | NO. 61546-7-I |
| | ) | |
| Respondent, | ) | DIVISION ONE |
| v. | ) | |
| | ) | |
| JOSHUA LAFARIOUS JONES, | ) | Unpublished Opinion |
| | ) | |
| Appellant. | ) | FILED: June 1, 2009 |
| | ) | |

Lau, J. — Joshua Jones argues that the trial court violated his right to counsel of choice when it denied his day-of-trial motion to continue for the purpose of retaining counsel. Because the trial court has broad discretion to balance the defendant's interest in counsel of choice against the public's interest in the fair and efficient administration of justice, we conclude that the trial court did not abuse its discretion in denying Jones's request. And Jones's statement of additional grounds for review lacks merit. We affirm.

FACTS

On December 18, 2006, the State charged Jones with one count of possession with intent to deliver a controlled substance (cocaine). At trial, witnesses testified to

the following events.

On the evening of October 30, 2006, Seattle Police Officers Gregory Neubert and Michael Tietjen were on duty performing narcotics surveillance in downtown Seattle. They testified that they observed Jones and another individual, later identified as Torian Hopkins, standing at the corner of Second Avenue and Pike Street in downtown Seattle. The officers watched as another individual approached Jones and gave him money. Jones pulled a plastic baggie out of his coat pocket. Officer Neubert testified that he believed the substance in the baggie was rock cocaine, based on his training and experience. Jones removed a small piece of the substance from the baggie, gave it to the individual who had just paid him, and returned the baggie to his pocket.

The officers continued to observe as Jones and Hopkins walked northbound on Second Avenue and met with another individual later identified as Joshua Thelen. The three men returned to the corner of Second and Pike. Thelen made contact with another person, who gave him money. Thelen gave the money to Jones, who pulled the baggie out of his pocket and gave a piece of its contents to Thelen before returning it to his pocket. Thelen gave the substance to the man who had just paid him. Jones, Hopkins, and Thelen then walked northbound on Second Avenue.

Officers Neubert and Tietjen believed that they had just witnessed two drug transactions. They alerted Seattle Police Officers Edison and Zieger about the three men. Jones and his companions were standing on the corner of Second and Pine when the officers approached. Officers Neubert and Tietjen testified that they saw Jones reach into his coat pocket, pull out

the baggie, and throw it to the ground near Thelen's right foot.[1] Officer Neubert retrieved the baggie and arrested Jones. The substance in the baggie field-tested positive for cocaine.

Officer Neubert testified that the baggie contained about 20 pieces with a total weight of 3.5 grams. He further testified that in his training and experience, this sort of packaging was more consistent with a seller than a user. The contents of the baggie were analyzed by forensic scientist Raymond Kusumi, who found that they weighed a total of 3.3 grams and contained cocaine.

After an initial trial date was set, the trial court granted several continuances.[2] The record shows that the trial set for July 10, 2007, was continued to July 17, 2007, on Jones's motion, and continued again to July 23, 2007, on the State's motion.

On July 23, 2007, the first day of trial, the State informed the court that it was ready to proceed. Jones, however, moved for a continuance to allow him to obtain private counsel. The trial court denied Jones's motion.

> [Defense counsel]: Your Honor, there are a couple of issues that I would like to address with the Court.
>
> The first is Mr. Jones has been in contact and has, I think, given some money, or his family has given some money to Mr. Gurjit Pandher, who is a private counsel.
>
> Court: No, it is the day of trial. I am not continuing for that reason.
>
> [Defense counsel]: Okay, your Honor, and I would just note that I have spoken with Mr. Pandher. He says that he would need a continuance until September sometime in order to be ready for the case.
>
> Court: No, this case is on for trial.

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[1] Officers Edison and Zieger did not see Jones drop the suspected cocaine and did not recall seeing Officer Neubert recovering it from the ground.

[2] The State asserts that the trial court granted several other continuance motions by Jones, but these do not appear in the record.

Report of Proceedings (July 23, 2007) at 3.

The trial court heard testimony and argument on several pretrial motions over more than a two-week period. A jury trial followed. On August 14, 2007, a jury found Jones guilty as charged. On September 21, 2007, Jones waived his right to speedy sentencing. After a failure to appear on November 16, 2007, Jones was sentenced within the standard range on April 4, 2008. Jones appealed.

ANALYSIS

Motion to Continue and Substitute Counsel

Jones argues that the trial court violated his constitutional right to counsel of his choice when it denied his request for a continuance to obtain private counsel.

"'It is settled law that under the Sixth Amendment criminal defendants "who can afford to retain counsel have a qualified right to obtain counsel of their choice."'" State v. Roth, 75 Wn. App. 808, 824, 881 P.2d 268 (1994) (quoting United States v. Washington, 797 F.2d 1461, 1465 (9th Cir. 1986). But "the right to retained counsel of choice is not a right of the same force as other aspects of the right to counsel." Roth, 75 Wn. App. at 824. "[T]he essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant, not to ensure that a defendant will inexorably be represented by his or her counsel of choice." State v. Price, 126 Wn. App. 617, 631, 109 P.3d 27 (2005) (citing Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)).

The trial court has broad discretion in ruling on a motion for a continuance

sought to obtain new counsel. Price, 126 Wn. App. at 632. "The trial court must balance the defendant's interest in counsel of his or her choice against the 'public's interest in prompt and efficient administration of justice.'" Roth, 75 Wn. App. at 824 (quoting Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981)). The factors to be considered include (1) whether the court had granted previous continuances at the defendant's request, (2) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation, and (3) whether available counsel is prepared to go to trial.[3] Roth, 75 Wn. App. at 825.

Moreover, the request for counsel of choice must be timely asserted. State v. Chase, 59 Wn. App. 501, 506, 799 P.2d 272 (1990). "'[A] defendant's right to retained counsel of his choice doesn't include the right to unduly delay the proceedings.'" Roth, 75 Wn. App. at 824 (quoting United States v. Lillie, 989 F.2d 1054, 1056 (9th Cir. 1993)). "'In the absence of substantial reasons a late request should generally be denied, especially if the granting of such a request may result in delay of the trial.'" Chase, 59 Wn. App. 506 (quoting State v. Garcia, 92 Wn.2d 647, 655–56, 600 P.2d

[3] The fourth Roth factor—"whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature," Roth, 75 Wn. App. at 825—was arguably disapproved in United States v. Gonzalez-Lopez, 548 U.S. 140, 148, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (holding that "[w]here the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry. . . ."). The State contends that the fourth Roth factor remains vital and that Jones has failed to show prejudice. Because we conclude that the trial court did not abuse its discretion in denying Jones's motion, whether or not the fourth Roth factor is considered, we need not reach this question.

1010 (1979)). "[D]ay-of-trial continuances are not favored." Price, 126 Wn. App. at 633. A trial court's denial of a criminal defendant's motion for a continuance sought to preserve the right to counsel violates the defendant's right only if it is "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay.'" Roth, 75 Wn. App. at 824 (quoting Morris v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983)).

Jones contends that the trial court abused its discretion because it denied his motion for a continuance without making any on-the-record inquiry into the basis of his request. He asserts that the court's denial was arbitrary and unreasoning because it forced him to keep an attorney he did not want without engaging in the required penetrating examination and balancing of interests. We disagree.

In Roth, the defendant challenged the trial court's failure to engage in on-the record balancing before denying his motion for a continuance to permit his lead counsel to be present during jury selection. Roth, 75 Wn. App. at 823. The court disagreed.

> He cites no authority to support this argument, however. In general, outside of the ER 404(b) and ER 609 contexts, on-the-record balancing is not required because such a rule "would unnecessarily and unreasonably intrude upon the trial court's management of the trial process." State v. Gould, 58 Wn. App. 175, 184, 791 P.2d 569 (1990). In any event, the record in this case amply permits effective appellate review of the issue.

Roth, 75 Wn. App. at 826 n.12.

Similarly, the record in Jones's case is sufficient to permit us to conclude that the trial court reasonably balanced the competing considerations and concluded that the

fair and efficient administration of justice outweighed his choice of counsel. Jones's request was made on the first day of trial, after the court had already granted at least one previous continuance at Jones's request. Granting Jones's request would have required a two-month delay in the proceedings while new counsel prepared for trial. And Jones did not articulate dissatisfaction with counsel. The trial court did not abuse its discretion in denying Jones's request.

Statement of Additional Grounds for Review

In his pro se statement of additional grounds for review, Jones raises numerous issues that he claims require reversal of his conviction. None has merit.

First, Jones argues that his conviction for one count of possession with intent to deliver violated the rule against double jeopardy because the crime encompasses two separate charges—possession and delivery. Jones is mistaken. "The double jeopardy clauses of the state and federal constitutions prohibit multiple prosecutions and multiple punishments for the same criminal offense." State v. Taylor, 90 Wn. App. 312, 318, 950 P.2d 526 (1998). Jones was convicted of a single offense consisting of three elements: (1) unlawful possession (2) with intent to deliver (3) a controlled substance. RCW 69.50.401; State v. Hagler, 74 Wn. App. 232, 235, 872 P.2d 85 (1994).

Second, Jones argues that the State failed to prove that he had actual or constructive possession of the drugs because the police recovered the baggie from the ground and there were other people around, one of whom had an outstanding warrant on a drug charge. "In reviewing the sufficiency of the evidence in a criminal case, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt." Hagler, 74 Wn. App. at 234–35. "To establish constructive possession, courts must 'look at the totality of the situation to determine if there is substantial evidence tending to establish circumstances from which the jury can reasonably infer that the defendant had dominion and control of the drugs and thus was in constructive possession of them.'" State v. Porter, 58 Wn. App. 57, 60, 791 P.2d 905 (1990) (quoting State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977)). There is sufficient evidence to support Jones's conviction.

Third, Jones argues that the State violated his constitutional right to a fair trial. By the time the State filed charges against Jones, Hopkins had already been transported to another state pursuant to an outstanding warrant. Therefore, according to Jones, the State prevented him from calling Hopkins as a witness. This claim has no merit. The State cannot be held responsible for Hopkins' absence under these circumstances.

Fourth, Jones challenges the presence of the word "intent" in the jury instructions. He contends that the term encourages juries to convict based on assumptions rather than evidence. But the term "intent" is an element of the charged crime. Case law forbids the inference of intent to deliver without substantial evidence of the possessor's intent. Hagler, 74 Wn. App. at 235. "Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession." State v. Brown, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993). There is sufficient evidence to uphold Jones's conviction.

Fifth, Jones argues, "The State did

not prove I was on D-O-C before sentencing." He does not support this assertion with further argument, case law, or citations to the record. Based on this perfunctory statement, we are unable to determine the basis of the argument.

Sixth, Jones challenges the evidence identifying him as the individual who committed the charged crime. He contends that Officer Neubert's description in the police report matched Hopkins, not him. He further contends that Officers Neubert and Tietjen stated that they would not be able to pick him out of a lineup; therefore, they could not have identified him in court. Whether the officers accurately identified Jones as the perpetrator was a matter for the jury to decide.

Seventh, Jones calls our attention to a discrepancy in the reported weight of the rock cocaine retrieved from the baggie. Officer Neubert's police report stated that the cocaine weighed approximately 3.5 grams, but the forensic analyst testified that it weighed 3.3 grams. Jones does not attempt to explain the significance of this minor discrepancy, and we see none.

Eighth, Jones asks us to "review the outcome of the Brady[4] letter against Neubert's honesty." Jones does not support this claim with argument, case law, or citations to the record. Presumably, he is challenging the jury's decision to convict him despite evidence impugning Officer Neubert's reputation for veracity.[5] Assessing the

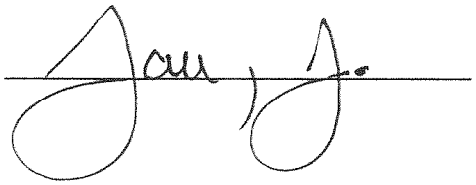
[4] Under Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Prior to trial, Jones moved to compel the State to produce impeachment evidence regarding Officer Neubert's reputation for veracity.

officer's credibility was a matter for the jury to decide.

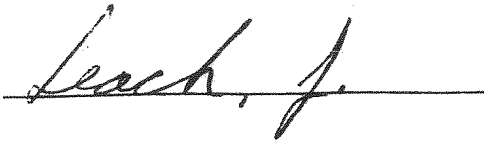
Ninth, Jones argues that "the State never produced the money in a case that requires money to support conviction." Evidence of cash in hand is not an element of the crime of possession with intent to deliver.[6]

Tenth, Jones argues that the prosecutor made improper statements in closing argument. A defendant who alleges improper conduct on the part of the prosecutor must establish that the prosecutor's remarks were both improper and prejudicial. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). Jones has not met this burden.

In sum, Jones was not unlawfully denied his counsel of choice and his statement of additional grounds for review lacks merit. We affirm.



WE CONCUR:



[5] The court allowed Jones to question Officers Neubert and Tietjen regarding their roles in a previous unrelated arrest because that evidence was probative of their veracity under ER 608(b). The court also permitted Jones to present evidence of the officers' possible bias or motivation to obtain convictions in drug cases, regardless of the facts, by making materially inaccurate or misleading statements or omissions.

[6] The trial court found that Jones was carrying $6 in cash at the time of arrest.